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JAMES R. BROWNING, Clerk

Supreme Court of the United States

REPLY BRIEF FOR PETITIONER

Supreme Court of the United States

OCTOBER TERM, 1958

No. 800

ADOLPH C. BURGER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Respondent's brief in opposition is largely a recitation of evidence, but nothing need be said here of this attempt to put the case in a purely factual posture. Nor need time be spent in countering the Government's fallacious suggestion that one of the questions presented by the petition is "an afterthought on appeal" (Br. 10). Record references are sufficient (R. 193, 198). The purpose of this reply is to consider only the Government's meager discussion of the legal issues raised by the petition.

I

Respondent first seeks to rescue the prosecution below from its failure to adduce any evidence tending to show that the money received by Cooper and Crocker constituted income to the corporation of which petitioner was president. Respondent does so by attacking petitioner's statement that "payments received by a shareholder upon the sale of corporate property have been held to be corporate income only if all the shareholders consent to the taking" (Pet. 7; Br. 8). Respondent states the rule to be that such payments increase corporate net income if received by a "controlling stockholder" (Br. 8, 9), even though the distribution of the diverted funds may bear no similarity to a dividend distribution, and even though the minority shareholders may think themselves defrauded. In support of this proposition, respondent cites (Br. 9) two cases which can only be read as supporting the petitioner's understanding of the rule,[1] one case which is at best ambiguous,[2] one case which is simply irrelevant,[3] and one case in which the court obviously did not

[1] Currier v. United States, 166 F.2d 346 (1st Cir. 1948); United Mercantile Agencies, Inc., 23 T.C. 1105 (1955), *rev'd on other grounds sub nom.* Drybrough v. Commissioner, 238 F.2d 735 (6th Cir. 1956). Respondent relies heavily (Br. 9 n. 3) on the fact that the court in *Currier* found it unnecessary to determine whether the 75% shareholder there involved was the "actual owner" of the remaining 25% of the stock. But the court did find it necessary to state that "the remaining 25% was held by his wife, who had received it as a 'gift' from him. She has never received dividends on it *and she has exercised no dominion or power over it.*" 166 F.2d at 348. (Emphasis added.)

[2] Simon v. Commissioner, 248 F.2d 869 (8th Cir. 1957) (sole shareholder).

[3] Kann v. Commissioner, 210 F.2d 247 (3d Cir. 1953), *cert. denied*, 347 U.S. 967 (diverted funds taxed to the diverters but not as dividends, the court having disclaimed knowledge, *id.* at 251, as to the existence of earnings and profits).

focus on the necessity of finding an increase in the *net* income of the corporation.[4]

Having thus discovered the "controlling shareholder" rule, respondent finds "easily distinguishable" the case of *Harry Sherin*, 13 T.C. 221, *acq.*, 1949-2 Cum. Bull. 1. The shareholder there involved, it is said, "was not a controlling stockholder" (Br. 9), while petitioner in the instant case owned "slightly more than 50% of the outstanding shares" (Br. 8). The fact of the matter is that there is conflicting testimony in the record (R. 14, 15, 103, 110-11, 137, 157) as to whether petitioner owned exactly 50% of the shares—as did the shareholder in *Sherin*[5]—or "slightly more than 50%." The jury was never instructed to resolve this conflict, as the trial court refused to give any instruction whatever on the definition of corporate income (R. 178-91, 193). Hence, even if respondent's rule of law be accepted, the record will not support its application in this case.

II

The petitioner reads the cases of *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115, and *Mesarosh* v. *United States*, 352 U.S. 1, as establishing the rule "that prosecutors in federal tribunals may not rely on the testimony of witnesses who have perjured themselves with respect to the same matters" (Pet. 16). Respondent notes that those cases dealt with situations in which the transgressions of the wit-

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[4] Union Stock Farms v. Commissioner, No. 15783, 9th Cir., March 9, 1959 (59-1 U.S.T.C. ¶ 9317), discussed in detail at Pet. 7 & 8 n. 2.

[5] See 13 T.C.

nesses were not discovered until after trial (Br. 10), but does not discuss or dispute the analysis offered in the petition. In effect, the Government concedes that prosecutors are barred in some cases from relying on the testimony of perjurious witnesses. It argues only that Cooper and Crocker are not within that class of witnesses whose use by the prosecution this Court has proscribed.

Respondent's attempt to distinguish the *Communist Party* and *Mesarosh* cases is based on the statement that "the testimony of Cooper and Crocker was directly contrary to the testimony for which they had been convicted of perjury" (Br. 11). Respondent suggests that their prior perjury convictions corroborate their subsequent testimony rather than discredit it![6]

In fact, of course, the gentlemen in question were convicted of perjury only for having falsely sworn that they had received no cash payments upon the sale of automobiles. Their best story having put them in prison, it would have been surprising had they insisted on repeating it. Instead they came up with a new story, which had as its predicate the testimony of the unimpeached witnesses but which also added something new. They conceded they had taken the money, but decided they had given most of it to petitioner. The Government infers that they had finally "decided to tell the truth" (Br. 10). But it is at least equally likely that the change in their testimony was merely

[6] Respondent also purports to find "corroboration" of Cooper and Crocker's statement—that they gave petitioner money—in the testimony of unimpeached witnesses that they gave money to Cooper and Crocker, and in a group of undecipherable notebooks which standing alone were meaningless (R. 106-07) but which Cooper says were a record of the payments received by him.

a tactical move by Cooper and Crocker in their consistent pursuit of freedom from criminal prosecution and from civil liability for failure to pay their individual income taxes.

In the *Communist Party* and *Mesarosh* cases, this Court denied to the prosecution the privilege of having the trier of fact speculate as to whether the witnesses there involved were speaking truthfully or were continuing in a well established pattern of falsehoods. The witnesses having demonstrated both their willingness and their motivation to swear falsely on the subject matter in question, the use of their testimony by the Government could not bear the scrutiny of "fastidious regard for the honor of the administration of justice." *Communist Party* v. *Subversive Activities Control Board,* 351 U.S. 115, 124. The Government is in no better a position here. For, although Cooper and Crocker have changed their testimony, the change shows neither that the motivation to lie has been banished nor that prison has reformed their morals. It cannot enhance their credibility.

III

Finally, respondent acknowledges that the record shows the first count of the indictment to be barred. Respondent also agrees that in such a state of the record a conviction cannot properly be obtained. It is claimed, however, that since "no such point was raised at the trial, . . . petitioner cannot complain now" (Br. 12).[7]

Respondent does not seek to defend the court of appeals in its use of material not properly in the

[7] As to whether the point was raised at trial, see R. 151, 200. The court below considered the point on the merits in spite of respondent's suggestion that petitioner had waived his objection.

record. Instead, this Court is told that there is no need to consider the limitations problem at all as there is a new ground—waiver—for sustaining the judgment below. This ground at best is a doubtful one. Three judges of the Court of Appeals for the Third Circuit, for example, have taken the position that a criminal conviction cannot be sustained when barred by the statute of limitations even if no objection was made at trial. *United States* v. *Waldin*, 253 F. 2d 558 (3d Cir. 1958) (dissenting opinion), *cert. denied*, 356 U.S. 973. If, as the Government apparently concedes, the decision below can be sustained only by accepting the doctrine of waiver, an additional reason for granting the writ is presented.

Respectfully submitted,

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